IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.1007 OF 2014

Commissioner of Income Tax-1,
Aayakar Bhavan, M.K. Road,
Mumbai-400 020. .... Appellant

- Versus -

M/s. Indian Rare Earths
Limited, Plot No.1207,
Veer Savarkar Marg,
Near Siddhivinayak Temple,
Prabhadevi, Mumbai-400 028.
PAN: AAACI2799F .... Respondent

Mr. Suresh Kumar for the Appellant.

Mr. Sanjiv M. Shah for the Respondent.

CORAM: S.C. DHARMADHIKARI &
A.K. MENON, JJ.

DATE: APRIL 13, 2015

P.C. (Per A.K. MENON, J.):

1. The Revenue has proposed the following

questions as substantial questions of law:-

> "(1) Whether in facts and circumstances of the case and in Law, the ITAT is justified in holding that reason to reopen, being incorrect allowance of "terminal" depreciation, which allowance is not allowable under any provision of the Act, tantamounts to change of opinion?.
>
> (2) Whether in facts and circumstances of the case and in Law, it is not true that a change of opinion is possible only where two views are possible on an issue and therefore in respect of a deduction claim, terminal depreciation in the present case, which does not even find mention anywhere in the Act as a deduction, there is no possibility of two views and consequently no question of change of opinion getting imbibed upon the reasons recorded for reopening?
>
> (3) Whether in facts and circumstances of the case and in Law, the ITAT is justified in holding that the assessment made u/s.147 is bad in law?"

2. In the present case pertaining to assessment year 2005-06, the assessee had claimed depreciation on building, plant and

machinery, furnitures, fixtures and vehicles amounting to Rs.52,26,638/-. The claim of the assessee was described as "terminal depreciation". The Assessing Officer was of the view that the expression "terminal depreciation" is wrong as there is no provision under the Income Tax Act, 1961 ("the Act") to allow terminal depreciation. He, therefore, disallowed the deduction claimed by the assessee. He was of the view, that in response to Notice issued under Section 143(2) and 142(1) of the Act the assessee did not turn up for the hearing and merely filed a letter dated 9-7-2010. Based on the material on record, therefore, the Assessing Officer came to the conclusion that the assessee could not claim Terminal depreciation and disallowed the same.

3. In appeal before the Commissioner of Income Tax (Appeals), the assessee was granted

the benefits of the depreciation claimed. The Revenue, being aggrieved, preferred an Appeal before the Income Tax Appellate Tribunal. The Tribunal was of the view that the depreciation claimed by the assessee during the previous year, though described as terminal depreciation could not be disallowed and there was no case for re-opening the assessment. The Tribunal found that the Assessing Officer had incorrectly concluded that income amounting to Rs.52,26,638/- had escaped from assessment and observed, that the Assessing Officer had change of opinion without any tangible material.

4. We have heard Mr.Suresh Kumar on behalf of the revenue and Mr.Shah on behalf of the assessee. They have taken us through the proceedings before the Tribunal and the authorities below.

5. The term "depreciation" as ordinarily understood in the context of the Income Tax Act, 1961 has been considered by the Hon'ble Supreme Court in the case of *I.C.D.S. Ltd. v. Commissioner of Income Tax, Mysore* reported in *AIR 2013 (SC) 3037*, the Hon'ble Supreme Court was concerned with the interpretation of section 32 of the Income Tax Act, 1961. the Hon'ble Supreme Court held as under :-

> "Depreciation is the monetary equivalent of the wear and tear suffered by a capital asset that is set aside to facilitate its replacement when the asset becomes dysfunctional. In P.K. Badiani Vs. Commissioner of Income Tax, Bombay[2], this Court has observed that allowance for depreciation is to replace the value of an asset to the extent it has depreciated during the period of accounting relevant to the assessment year and as the value has, to that extent, been lost, the

corresponding allowance for depreciation takes place.

Furthermore, Black's Law Dictionary (5th Edn.) defines 'depreciation' to mean, inter alia:

> "A fall in value; reduction of worth. The deterioration or the loss or lessening in value, arising from age, use, and improvements, due to better methods. A decline in value of property caused by wear or obsolescence and is usually measured by a set formula which reflects these elements over a given period of useful life of property.... Consistent gradual process of estimating and allocating cost of capital investments over estimated useful life of asset in order to match cost against earnings....."

Applying the above interpretation of Section 32 of the Act, in the instant case we have no manner of doubt that the assessee had in fact claimed depreciation as contemplated under section 32 merely because it was termed as "Terminal depreciation" was no reason to disallow the claim.

5. The Tribunal has relied, and in our view correctly, upon the decision of the Hon'ble Supreme Court in the case of CIT Vs. Kelvinator of India Ltd., reported in (2010) 320 ITR 561 (SC), which held that the concept of change of opinion should be used as a test to check any abuse of power by the Assessing Officer. In our view, the test is correctly applied in the present case and there was no occasion for the Assessing Officer to reopen the assessment without any tangible material which formed a live link to the formation of reason to believe escapement of income. There is nothing to show that he had reason to believe that income had escaped assessment. Mere description of the depreciation claimed as

“terminal depreciation” could not have justified the conclusion reached by the Assessing Officer. In our view, therefore, no substantial question of law arises in the present case. The appeal is dismissed. No order as to costs.

(A.K. MENON, J.) (S.C. DHARMADHIKARI, J.)